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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA
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14 CACHIL DEHE BAND OF WINTUN
15 INDIANS OF THE COLUSA INDIAN
16 COMMUNITY, a federally
17 recognized Indian Tribe,

18 Plaintiff,

19 PICAYUNE RANCHERIA OF THE
20 CHUKCHANSI INDIANS, a
21 a federally recognized Indian
22 Tribe,

23 Plaintiff
24 in Intervention,

25 v.

NO. CIV. S-04-2265 FCD KJM
(Consolidated Cases)

26 STATE OF CALIFORNIA;
27 CALIFORNIA GAMBLING CONTROL
28 COMMISSION, an agency of the
State of California; and
ARNOLD SCHWARZENEGGER,
Governor of the State of
California,

Defendants.

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1 This matter is before the court on defendants State of
2 California, California Gambling Control Commission (the
3 "Commission" or "CGCC"), and Governor Arnold Schwarzenegger's
4 (collectively, the "defendants") motion to stay execution of
5 final judgment entered on August 19, 2009. Plaintiff Cachil Dehe
6 Band of Wintun Indians of the Colusa Indian Community ("Colusa")
7 and plaintiff-intervenor Picayune Rancheria of the Chukchansi
8 Indians' ("Picayune") (collectively, "plaintiffs") oppose the
9 motions. For the reasons set forth herein,¹ defendants' motion
10 is DENIED.

11 **BACKGROUND²**

12 Through this litigation, plaintiff Colusa, an American
13 Indian Tribe, and plaintiff-intervenor Picayune, also a federally
14 recognized Indian tribe, challenged interpretation of various
15 terms in their Class III Gaming Compacts (the "Compacts" or
16 "Compact") entered into with the State of California (the
17 "State") in 1999. 55 other tribes (the "Compact Tribes")
18 executed virtually identical compacts with the State around the
19 same time. At their core, these compacts authorize Class III
20 gaming pursuant to certain restrictions. However, plaintiffs
21 contended that defendants' interpretation of the Compact
22 impermissibly limited the amount of licenses available to the
23 Compact tribes. Colusa also challenged defendants'

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26 ¹ Because oral argument will not be of material
27 assistance, the court orders this matter submitted on the briefs.
E.D. Cal. Local Rule 78-230(h).

28 ² The facts of this case are set forth fully in the
court's April 22 Order. (April 22 Order [Docket # 102], filed
Apr. 22, 2009).

1 interpretation of other provisions of the Compact that it argued
2 impermissibly limited its gaming opportunities.

3 On April 22, 2009, the court issued its Memorandum and Order
4 (the "April 22 Order"). The court granted Colusa's motion for
5 summary judgment with respect to its claims regarding (1)
6 Colusa's priority in the draw process; and (2) the number of
7 gaming devices authorized by the Compact. The court also granted
8 Picayune's motion for summary judgment in its sole claim
9 regarding the number of gaming devices authorized by the Compact.
10 The court granted defendants' motions regarding (1) defendants'
11 retention of license fees; (2) the Commission's authority to
12 administer the draw process; (3) defendants' refusal to schedule
13 and conduct a round of draws; and (4) defendants' counting of
14 multi-station games as equal to the number of their terminals.
15 On June 19, 2009, defendants filed a motion for reconsideration
16 of the court's ruling on the size of the statewide gaming device
17 license pool. The court denied the motion on August 11, 2009
18 (the "August 11 Order").

19 Plaintiffs filed motions for entry of final judgment. The
20 court also granted San Pasqual Band of Mission Indians, a
21 federally recognized Indian tribe that has brought very similar
22 claims against defendants in the Southern District of California,
23 requested leave to file an *amicus* brief in support of entry of
24 final judgment. On August 19, 2009, the court entered final
25 judgment on all six of the claims resolved by the April 22 Order.
26 The court ordered defendants to schedule and conduct a draw of
27 all available gaming device licenses, in accordance with the
28 court's April 22 Order, and in which all eligible Compact Tribes

1 may participate, within forty five (45) days of the entry of
2 judgment. On September 1, 2009, defendants filed the instant
3 motion to stay the judgment pending appeal.

4 **STANDARD**

5 A stay of a judgment pending appeal is "'an exercise of
6 judicial discretion,' and 'the propriety of its issue is
7 dependent upon the circumstances of the particular case.'" Nken
8 v. Holder, 129 S. Ct. 1749, 1760-61 (2009) (quoting Virginian R.
9 Co. v. United States, 272 U.S. 658, 672-73 (1926)); see Hilton v.
10 Braunskill, 481 U.S. 770, 777 (1987) ("[T]he traditional stay
11 factors contemplate individualized judgments in each case.").
12 The court considers four factors in determining whether to grant
13 a stay pending appeal:

14 (1) whether the stay applicant has made a strong
15 showing that he is likely to succeed on the merits; (2)
16 whether the applicant will be irreparably injured
17 absent a stay; (3) whether issuance of the stay will
substantially injure the other parties interested in
the proceeding; and (4) where the public interest lies.

18 Nken, 129 S. Ct. at 1761 (quoting Hilton, 481 U.S. at 776). The
19 Supreme Court has noted that these factors are substantially
20 similar to those governing the issuance of a preliminary
21 injunction and that such overlap exists "because similar concerns
22 arise whenever a court order may allow or disallow anticipated
23 action before the legality of that action has been conclusively
24 determined." Id. (citing Winter v. Natural Res. Def. Council,
25 129 S. Ct 365, 376-77 (2008)).

26 The first two factors are the most critical. Id. The
27 applicant must show that the likelihood of success on the merits
28 is "better than negligible." Id. The applicant must also show

1 that irreparable injury is likely; mere "possibility" is
 2 insufficient. Id. (citing Winter, 129 S. Ct. at 375.)³

3 However, "[a] stay is not a matter of right, even if
 4 irreparable injury might otherwise result." Virginian R. Co.,
 5 272 U.S. at 672. "The party requesting a stay bears the burden
 6 of showing that the circumstances justify an exercise of [the
 7 court's] discretion." Nken, 129 S. Ct. at 1761.

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11 ³ In their moving papers, citing cases decided prior to
 12 the Supreme Court's decision in both Winter and Nken, defendants
 13 ask this court to apply the sliding scale analysis previously
 14 used by the Ninth Circuit in determining whether injunctive
 15 relief is appropriate. The Ninth Circuit's opinion in American
 16 Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052
 17 (9th Cir. 2009), emphasized that the sliding scale analysis is no
 18 longer controlling or viable to the extent they suggest a lesser
 19 standard than that set forth by the Supreme Court in Winter. The
 20 Ninth Circuit expressly disapproved of Lands Council v. Martin,
 21 479 F.3d 636, 639 (9th Cir. 2007) which had permitted something
 22 less than a showing of a likelihood of success on the merits.
 23 Am. Trucking, 559 F.3d at 1052 n. 10. Indeed, the Ninth
 24 Circuit's most recently published cases underscore the
 requirement of Winter's four prong test. Sierra Forest Legacy v.
Rey, - F.3d -, No. 07-12892, 2009 WL 2462216, *3, 5-6 (9th Cir.
 Aug. 13, 2009) (reversing district court's denial of motion for
 preliminary injunction and remanding for consideration of the
 non-merits factors in Winter, namely, likelihood of irreparable
 harm, the balance of equities and the public interest); see also
Stormans, Inc. v. Selecky, 571 F.3d 960, 977-78 (9th Cir. 2009)
 (citing Winter's four prong test, without mentioning any
 alternative, sliding-scale test, or more specifically, the grant
 of injunctive relief based on a showing of serious questions
 going to the merits); Marlyn Nutraceuticals, Inc. v. Mucos Pharma
GMGH & Co., 571 F.3d 873, 877 (9th Cir. 2009).

25 Moreover, Justice Kennedy's concurrence in Nken lends
 26 further credence to rigorously applying the four part requirement
 27 set forth in the majority's opinion. Specifically, Justice
 28 Kenney advised that "when considering success on the merits and
 irreparable harm, courts cannot dispense with the required
 showing of one simply because there is a strong likelihood of the
 other." 129 S. Ct. at 1763 (citing Curry v. Baker, 479 U.S.
 1301, 1302 (1986); Ruckelshaus v. Monsanto Co., 463 U.S. 1315,
 1317 (1983)).

ANALYSIS

A. Success on the Merits

Defendants contend that they are likely to succeed on the merits with respect to their questions of "whether it was proper . . . for the court to weigh disputed facts in order to determine: (a) that the parties had no common understanding of the meaning of § 4.3.2.2(a)(1) of Colusa and Picayune's respective Compacts at the time the Compacts were executed in 1999; and (b) that the 1999 Compact was drafted by the State without negotiation by Colusa and Picayune, and is therefore subject to the doctrine of *contra proferentem*." (Def.'s Mot., filed Sept. 1, 2009, at 9.) Defendants also assert, for the very first time, that there was not a sufficient binding agreement between the parties. (*Id.* at 12.) Finally, defendants assert that the court's entry of judgment pursuant to the Ninth Circuit's remand order in is an "unusual remedy," which creates an "asymmetrical legal relationship between the 1999 Compact tribes and the State." (*Id.* at 14.)

As an initial matter, the court notes that defendants again⁴ grossly mischaracterize the content of the April 22 Order. First, on a motion for summary judgment, the court does not "weigh" the evidence submitted by the parties; the court did not do so in this case. Rather, the court considered whether any of the evidence submitted by the parties raised a triable issue of fact sufficient to go to a jury. While all parties presented evidence of the number of licenses their representatives believed

⁴ Defendants similarly failed to accurately interpret the court's April 22 Order in its briefing in support of the Motion for Reconsideration.

1 § 4.3.2.2(a)(1) allowed, *neither* plaintiffs nor defendants
2 presented evidence of a mutual understanding of the intention of
3 the parties. Accordingly, based upon a review of *all* the
4 evidence submitted by the parties, defendants failed to raise a
5 triable issue, and plaintiffs demonstrated that their alternative
6 interpretation was correct as a matter of law.

7 Second, the court's holding in this case was not based
8 solely on application of the doctrine of *contra proferentum*. As
9 set forth in the court's April 22 Order as well as the court's
10 August 11 Order, denying defendants' motion for reconsideration,
11 the court held that the alternative formulation most accurately
12 followed the language of § 4.3.2.2(a)(1) and gave words their
13 ordinary meaning. This construction was also consistent with the
14 underlying purpose as set forth by defendants' counsel at oral
15 argument. Therefore, defendant's objection to the court's
16 analysis with respect doctrine of *contra proferentum* is not
17 determinative of the merits in this case.

18 Third, defendants now attempt to argue a position they have
19 never raised in the multitude of motions, briefing, and
20 supplemental briefing submitted to this court -- that there is no
21 contract. Defendants have never sought invalidation of the
22 contract for indefiniteness. Cf. Family Snacks of North
23 Carolina, Inc. v. Prepared Prods. Co., Inc., 295 F.3d 864, 868-69
24 (8th Cir. 2002) (examining, under Missouri law, whether the
25 contract failed for indefiniteness and holding that it did not
26 based upon the parties clear intention to make a contract).
27 Further, defendants not only fail to cite any relevant,
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1 precedential authority to support their contention,⁵ they also
2 fail to support this novel assertion with any probative evidence.
3 Rather, throughout this litigation and specifically in the
4 parties' dispositive motions, the parties have submitted their
5 evidence and arguments on the premise that all parties intended
6 to enter into a contract and that such contract provided for a
7 statewide cap in licenses; indeed, defendants represented that
8 "The Parties Agree That Section 4.3.2.2(a)(1) is Ambiguous."
9 (Def's.' Reply to Colusa's Opp'n to Mot. for Summ. J. [Docket
10 #88], filed Feb. 13, 2009, at 2.) As such, *defendants'*
11 submissions and arguments have always focused on *which*
12 interpretation of the contract, i.e. the Compact, the court
13 should accept. (*Id.*) Now, after failing to prevail on
14 vigorously litigated cross-motions for summary judgment and a
15 motion for reconsideration, defendants seek to recast their
16 arguments, contrary to their prior litigation position and
17 without citation to precedential authority or probative evidence.
18 This is not a basis for demonstrating likelihood of success on
19 appeal.

20 Further, defendants argue that the court's order entering
21 final judgment, requiring defendants to conduct a draw in which
22 all eligible 1999 Compact tribes may participate, is inequitable
23 because non-party tribes may benefit from the court's ruling
24 without being bound by it. The court acknowledges that the
25 relief accorded in this case is unusual. However, such relief is

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27 ⁵ Defendants' citation to Cotran v. Rollins Hudig Hall
28 Int'l, Inc., 17 Cal. 4th 93, 112-13 (1998), is unavailing. In
Cotran, the California Supreme Court first considered whether
there was an implied contract between the parties. No party in
this litigation has ever advanced a theory of implied contract.

1 consistent with the Ninth Circuit's analysis in its remand order,
2 holding that absent Compact tribes were not necessary parties
3 even though "the outcome of Colusa's litigation may have some
4 financial consequences for non-party tribes." Cachil Dehe Band
5 of Wintun Indians of the Colusa Indian Cmty. v. California
6 ("Colusa"), 547 F.3d 962, 971 (9th Cir. 2008). In its order
7 entering final judgment, the court noted that while the Ninth
8 Circuit clearly stated that the merits of the litigation centered
9 on the specific claims between the named plaintiff and
10 defendants, the Colusa court also recognized that the relief
11 awarded in this action would have an incidental effect on other
12 1999 Compact tribes. Id. at 972. As such, the court concluded
13 that the Ninth Circuit's Order implicitly contemplated an
14 increase in the overall size of the license pool created by the
15 1999 Compacts as an "incidental" effect on non-party Compact
16 Tribes. See Colusa, 547 F.3d at 971-72 (noting that those tribes
17 "who intend to expand their gaming tribes will gladly accept an
18 increase in the size of the license pool created by the 1999
19 Compacts"). While defendants disagree with the court's
20 interpretation of the Ninth Circuit's order, they have failed to
21 offer any compelling arguments regarding why such disagreement
22 amounts to a likelihood of success on the merits.

23 Finally, the court notes that the Ninth Circuit explicitly
24 addressed defendants' concerns regarding inconsistent obligations
25 imposed by different district courts confronting the issue and
26 explained that the Circuit court could resolve such issues on
27 appeal. Specifically, the Ninth Circuit provided that "[s]hould
28 different district courts reach inconsistent conclusions with

1 respect to the license pool created under the 1999 Compacts, such
2 inconsistencies could be resolved in an appeal to this court."
3 Id. at 972 n.12. The court has resolved the issues before it,
4 and, in accordance with the Colusa court's direction, defendants
5 may seek whatever resolution they argue is required before the
6 Ninth Circuit.

7 Accordingly, defendants have failed to meet their burden of
8 demonstrating likelihood of success on the merits.

9 **B. Irreparable Injury**

10 Defendants contend that they will suffer irreparable injury
11 if judgment is not stayed because it will suffer (1) the
12 administrative burden of issuing and possibly revoking licenses
13 that should not have been issued; and (2) the burden of defending
14 its public policy issues relating to increased patronage of
15 tribal casinos and the incumbent effect on local environments and
16 government services, including personal bankruptcies. Defendants
17 assert that plaintiff and non-party 1999 Compact Tribes may be
18 unjustly enriched by the relief accorded in this case.

19 With respect to their first contention, defendants fail to
20 cite any authority to support its position that the
21 administrative burdens of complying with court order can
22 constitute irreparable injury. Nor have defendants proffered any
23 evidence to clarify the injury that this conclusorily proffered
24 burden would inflict. As such, the court cannot find that
25 defendants' "administrative burden" is an injury sufficient to
26 justify imposition of a stay.⁶

27 ⁶ Defendants argue that if licenses are issued and later
28 determined to be invalid on appeal, they will be forced to
(continued...)

1 With respect to their second contention, defendants' claimed
2 injury is, at best, speculative. First, defendants have no
3 evidence of how much tribal gaming will increase as a result of
4 execution of this court's order. Indeed, in arguing that
5 plaintiffs will not suffer definite, substantial injury,
6 defendants assert that "the timing of the increase in gambling
7 that will occur as a result of the availability of more licenses
8 in the statewide pool cannot be predicted with certainty under
9 current economic circumstances." (Defs.' Mot. at 8.) Similarly,
10 defendants do not proffer any evidence regarding how many
11 licenses plaintiffs and the eligible 1999 Compact Tribes will
12 seek in the court ordered draw. Nor do defendants proffer any
13 evidence regarding when the devices that are drawn will be put
14 into use or by which Tribes. Further, defendants fail to proffer
15 any evidence regarding how this unknown number of potential
16 additional gaming devices put into use by unidentified tribes
17 will impact specific local infrastructures. Moreover, defendants
18 fail to point to any evidence that identifies how the issuance of
19 an unknown number of additional gaming devices will increase
20 personal bankruptcies. Accordingly, defendants have failed to
21 demonstrate irreparable injury on these grounds.

22 Finally, the court finds defendants' arguments with respect
23 to unjust enrichment unpersuasive. Plaintiffs present evidence
24 that additional gaming devices will likely translate into

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26 ⁶(...continued)
27 initiate dispute resolution proceedings with any Compact Tribes
28 that refuse to acknowledge cancellation and cease operation of
the machines. Assuming that the Ninth Circuit invalidates the
licenses and assuming that non-party Compact Tribes would refuse
to comply with the decision, defendants have pointed to a system
for recourse. As such, any injury is not irreparable.

1 additional revenue. However, plaintiffs represent that have no
2 recourse to sue for the monetary loss suffered as a result of
3 defendants' failure to issue additional licenses. In April 2009,
4 the court concluded that the Compact provided for more gaming
5 device licenses in the statewide pool than defendants had
6 accounted for in their interpretations. The court entered
7 judgment on these claims on August 11, 2009, after deciding
8 defendants' motion for reconsideration on these claims as well as
9 their opposition to entry of final judgment. Because the court
10 has concluded that defendants' failed to demonstrate that they
11 are likely to succeed on appeal, it is plaintiffs that suffer
12 harm, for which they cannot later recovery monetary relief, by
13 delay of judgment.

14 Therefore, defendants have failed to meet their burden of
15 demonstrating irreparable injury in the absence of a stay.⁷

16 CONCLUSION

17 For the reasons stated above, defendants' motion for stay of
18 judgment pending appeal is DENIED.

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23 ⁷ Because defendants have failed to meet their burden
24 with respect to demonstrating both a likelihood of success on the
25 merits and a likelihood of irreparable injury, the court need not
26 reach the other equitable factors of whether issuance of the stay
27 will substantially injure the other parties interested in the
28 proceeding and where the public interest lies.

26 The court notes that numerous non-party Compact Tribes filed
27 *amicus curiae* briefs in opposition to defendants' motion to stay,
28 arguing that they would be negatively impacted by such relief.
Because these determinations are not necessary to the court's
analysis, the court denies the various applications to file
amicus curiae briefs.

IT IS SO ORDERED.

DATED: September 11, 2009.

A handwritten signature in black ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE